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Comments of

**The Airports Council International – North America
American Association of Airport Executives**

Docket No. FAA-2002-13918 -25

**Notice of Proposed Rulemaking
Revisions to Passenger Facility Charge Rule
For Compensation to Air Carriers
67 Federal Register 70878 (November 27, 2002)
USDOT, FAA 14 CFR Part 158 (Notice No.02-19)**

**COMMENTS OF
THE AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA and the
AMERICAN ASSOCIATION OF AIRPORT EXECUTIVES**

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Airports Council International-North America ("ACI-NA") and the American Association of Airport Executives ("AAAE") hereby submit these comments in response to the Federal Aviation Administration (FAA), Department of Transportation's (DOT) Notice of Proposed Rulemaking on "Revisions to Passenger Facility Charge Rule for Compensation to Air Carriers" published in the Federal Register on November 27, 2002 in the above-referenced proceeding.

ACI-NA represents the local, regional and state-governing bodies that own and operate the principal airports served by scheduled air carriers in the United States. The U.S. airport members of ACI-NA enplane more than 98 percent of the total domestic, and virtually all international, scheduled airline passenger and cargo traffic in the United States. ACI-NA's member airports are owned and operated, in large part, by state and local governments and by regional airport authorities.

AAAE is the largest professional organization for airport executives in the world, representing thousands of airport management personnel at public use airports of all sizes nationwide.

Since the inception of the PFC program, through the Aviation Safety and Capacity Expansion Act of 1990, ACI-NA's and AAEE's member airports have been the beneficiaries and strong supporters of the program. Currently there are 334 airports that rely on these desperately needed funds. Of the top 100 airports in the U.S., 85 currently have been approved to collect PFCs. The capital generation of the PFC program totaled approximately \$1.6 billion in 2001 and an estimated \$2.0 billion in 2002, a substantial amount for airports and our national aviation system. The PFC program also allows airport operators to fund projects that increase

safety, security and capacity, provide for noise reduction, and allow airports to promote competition among air carriers. PFCs provide an essential tool for airport operators to fund development at our nation's commercial airports.

The Statement of Managers in the House Report 106-513 (to accompany the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. 106-181, 114 Stat. 61 (April 5, 2000) (AIR-21)) recommended that FAA reevaluate the PFC handling fee, which entitles air carriers to compensation for administrative costs incurred in collecting and remitting PFCs to airports. ACI-NA/AAAE supported this measure and agreed in principle that air carriers should be compensated for such expenses incurred.

On April 27, 2000, the Office of the Inspector General (OIG) of the Department of Transportation made a recommendation to the FAA on the conduct of the proposed rulemaking on PFC collection costs. Specifically, the OIG suggested that cost data be "limited to those incremental costs that are directly associated with PFC collection, handling, remittance, reporting, record keeping, or auditing." ACI-NA/AAAE strongly concur with the OIG's conclusions concerning the costs which FAA should consider.

ACI-NA/AAAE firmly believe that the air carriers should be fairly compensated for actual, quantifiable, direct costs incurred for PFC collection and remittance. However, we do not believe that either the Air Transport Association of America or the air carriers have made a sufficient case for increasing carriers' compensation on PFCs collected. Accordingly, we believe an increase to the compensation to air carriers must be substantiated by hard, measurable, verifiable data. A major portion of the submitted costs by the airlines does not meet the OIG's intent and legitimacy test, as described below:

1. ACI-NA/AAAE support the FAA proposal to disallow absorption costs in the compensation equation to air carriers. ACI-NA/AAAE agree that the PFC program, which is critical to our aviation system, "...should not bear the burden of price sensitivity in [any] market[s]." An efficient free market system can only exist without such subsidies. For those carriers that calculated absorbed costs, the costs were not direct but estimated by an arbitrary methodology.

2. ACI-NA/AAAE agree that the largest component of FAA's analysis, the credit card fees charged to air carriers, should be reimbursable as direct handling costs. FAA's analysis shows that this component is responsible for 43.7% of the compensation total or just over \$.05 per PFC. Consequently it is not clear why FAA is proposing a switch to a "collected" versus "remitted" basis for calculating the carriers' compensation. In discussions with bankers in the retail credit markets, it is clear that air carriers do not incur any credit card charges for refunded tickets. Potential cost savings would not justify changing to the "collected" basis. Both airlines and airports would incur significant cost to convert accounting, payment, collection, and reporting systems and would generate significant reconciliation problems. A change in methods would be particularly costly to airports since it can be expected that not all airlines would convert at the same time. The Notice of Proposed Rulemaking does not present any cost benefit analysis to justify this change in payment methods.

The treatment of PFC remittances on a collected basis raises another important concern. The current audit guidelines require only a random sampling by the auditing firm. This provides the airport with little reassurance that the proper amounts are being remitted for refunded and non-paying tickets. ACI-NA and AAAE ask that DOT address this inadequacy by requiring air carrier auditors to conduct a comprehensive audit based on full financial information gathered

from the two air carrier ticket clearing houses; Airline Reporting Corporation (ARC) and the Billing & Settlement Plan (BSP).

3. ACI-NA/AAAE oppose including at least three of the cost components of the analysis conducted by FAA in their review of fair carrier compensation. It is especially unclear how reservation services (17.5% -- of estimated total PFC collection costs), disclosure costs (11.2%), and passenger service expenses (9.4%) are “directly associated” with PFC collection and remittance. Jointly, these costs account for an additional 38.2% of the estimated PFC collection cost total. Again, these specific costs are defined as (a) reservation services (the NPRM indicates these charges “include the cost of increased telephone ‘talk time’ with airline customers when they make airline reservations by telephone”); (b) disclosure costs, “carrier provide notice to the passenger that PFCs may be applicable”; and (c) “increased face-to-face time with customers.” Although “agreed upon procedures” were specified, it is clear that the calculation and cost allocation methodologies necessary to estimate these three potential costs would allow flexibility for impressionistic interpretation rather than exact direct cost calculation. As a consequence, the interpretations allow arbitrariness, miscalculation and error. ACI-NA/AAAE question whether or not these costs can be accurately determined to this level of detail. It would challenge the most astute cost allocator to sample reservation and customer service agents accurately, and to get them to account accurately, for these sub-particles of their daily time schedule or to measure accurately, all areas of advertising devoted to PFC disclosure.

More importantly, it would appear that these costs are either inefficient expenses (in that they can be controllable and can be minimized) or are simply not directly associated with PFC collection and remittance, but merely an exercise in allocating the total costs to its individual components. For these costs to be directly associated with PFC collection and remittance hinges

on the answer to a very simple question; if PFCs were to disappear, would carriers continue to incur these three costs? Given their variability, intangible nature, and arbitrariness, it would appear that the carriers would continue to incur these costs. Consequently, such costs should not be included into any compensation calculation. Based on FAA's analysis these three costs account for over 38% or \$.044 of the proposed compensation fee of \$.10. This analysis suggests that if anything it appears that FAA's proposed increase should actually be a decrease in the PFC compensation fee [$$.10 - $.044 = $.056$ or $$.11 - $.044 = $.066$].

Further it is evident through industry trends that more air carriers are providing attractive incentives to travelers to book reservations on-line. On-line ticketing is growing at an exponential rate. If these trends persist, costs such as these along with many of the other airline cost items, will diminish rapidly and disappear. Therefore, airline costs associated with PFC collections would decrease as well.

4. ACI-NA/AAAE oppose the Federal government subsidizing inefficiency. FAA's own analysis shows that the lowest cumulative cost of PFC collections is \$.0705, while the highest cost is \$.1439. It is unclear why some carriers should benefit from their ability to collect and remit PFCs more efficiently, while others are provided a disincentive from striving to increase the efficiency of their collection methods. The lowest total cost by a single carrier for PFC collection is only \$.0727 (actual) and \$.0894 (Pro-Forma) submitted by Northwest Airlines. Thus, the highest level of PFC compensation should not exceed the lowest calculated costs by a single carrier.

5. ACI-NA/AAAE agree that the FAA should include interest earned in their analysis. However, ACI-NA/AAAE suggest that FAA choose a more representative interest

rate, as the proposal as currently drafted will undoubtedly extend beyond 1999 (time of data collection) and the current year 2003. As most economic analysts would agree, interest rates were low in 1999 and although they have fallen further in recent years, the expectation is that they will increase over time to higher historical levels. There is no reason why the timing of this notice should reward carriers. A more logical course of action would be to use an average annual interest rate based on a longer history of economic activity than the single year 1999. ACI-NA/AAAE suggest using a ten-year time period prior to this year (1992-2002). Coincidentally, this also correlates to the inception of the PFC program. This would have the effect of increasing the amount of interest earned and thus decreasing the calculated carrier compensation.

ACI-NA and AAAE recognize that a difficult economic condition now exists for the airline industry. Even though AAAE and ACI-NA do not agree that the airlines have sufficiently justified all of the components that constitute the increase in the handling fee, the associations do not oppose the proposed justifiable, direct cost-based parts of the increase. However, ACI-NA and AAAE strongly urge that FAA, if it concludes that the handling fee should be increased, at the same time better protect PFCs and better assure that they are properly remitted to airports, as described below.

BANKRUPTCY ISSUES

In determining whether or not to increase air carrier offsets for costs of collecting and remitting PFCs, it is equally important that FAA simultaneously insure: (i) that PFCs are in fact collected, accurately accounted for, remitted to and received in a timely fashion by airport authorities; and (ii) that the value of PFC revenue realized by airport authorities is not further

diminished by unnecessary time and dollar expense incurred in litigation to recover or retain PFC revenue to which they are entitled.

This need is particularly acute in light of increased air carrier bankruptcy filings and the lack of uniformity and certainty in the treatment of PFCs by bankrupt air carriers and the Bankruptcy Courts.

To maintain the integrity and inviolability of the PFC system, to realize Congress' intent in enacting the Aviation Safety and Capacity Expansion Act of 1990, the subsequent Federal Aviation Reauthorization Act of 1996, and AIR-21, and to ensure that airport authorities receive full value of PFC revenue to which they are entitled, there must be absolute certainty that: (i) PFCs collected are recognized and treated as trust funds belonging to the airport authorities; (ii) such trust fund status may not be questioned, challenged, impaired or defeated; (iii) it is expressly clear and recognized that PFCs neither are property of the air carriers nor reachable by their creditors other than by the airport authorities entitled to such PFCs; and (iv) PFCs are paid timely and on a current basis to airport authorities automatically, without any need for legal or judicial intervention or authorization.

At this juncture, however, such certainty is sorely lacking, particularly when an air carrier files for bankruptcy protection. This poses substantial costs for airport authorities, adversely affects the public interest, and defeats Congressional intent. Despite Congress' purpose in enacting the PFC legislation, airport authorities have been forced to expend significant funds and time through litigation to obtain -- and retain -- payment of PFC trust funds owed and owing to them by air carriers who file for bankruptcy protection.

Air carriers have failed or refused to pay outstanding PFCs or have failed or refused to pay PFCs timely and on a current basis going forward during the course of the bankruptcy proceedings, forcing the airport authority to seek relief from the Bankruptcy Court. In response to such appeals for relief, some Bankruptcy Courts continue to second-guess the trust fund nature of PFCs and the air carrier Debtor's lack of any legal or equitable interest therein. In addition, secured creditors who hold an interest in the air carrier Debtor's cash collateral may object to payment of PFCs to the extent they have not been segregated from the remainder of the Debtor's cash.

Alternatively, an air carrier which has filed for bankruptcy protection may (as has happened in the past) file a motion with the Bankruptcy Court at the inception of the case seeking authority to pay to airport authorities current and past due PFCs, but only in the air carrier Debtor's "discretion." In treating such payment as "discretionary" rather than "obligatory" and legally requisite, air carrier Debtors ask to be authorized to treat airport authorities not as statutory trust fund beneficiaries, but like "critical vendors." Critical vendors, under the court-developed "doctrine of necessity", receive "property of the estate" on a preferred basis during the bankruptcy proceeding *at the Debtor's discretion* because the goods and services being provided are deemed by the Debtor to be "necessary." Moreover, Bankruptcy Court orders authorizing such payments, discretionary or otherwise, also have directed depositories on which checks for such payments are drawn to honor them only *provided that* funds are available in the Debtors' bank accounts to cover such checks –jeopardizing airports' ability ultimately to receive the collected PFC's and thereby *de facto*, if not *de jure*, altering the trust fund nature of the PFCs.

In addition, air carriers in bankruptcy are increasingly suing airport authorities to recover PFC payments that were made to airport authorities in the 90 days prior to the filing of the air carrier's bankruptcy proceeding. These debtor air carriers claim that such PFC payments were "preferential transfers" of property belonging to the air carrier (and not trust funds), such that the transfers are avoidable under 11 U.S.C. section 547 and the PFC payments are recoverable from the airport authorities for the benefit of all of the air carrier's creditors.

In all of these litigation scenarios, airport authorities have been forced to spend thousands of dollars in legal fees and court costs to protect and realize their congressionally granted rights and entitlements respecting PFCs. Absent clear and incontrovertible regulations, the costs to airport authorities could skyrocket as more and more air carriers seek bankruptcy protection or other means of withholding payments in order to conserve rapidly diminishing cash.

Moreover, to permit the co-mingling of PFCs with funds in which the air carrier and its creditors hold an interest continues to jeopardize an airport authority's ability to realize PFCs in bankruptcy proceedings. The bases for such attacks include, but are not limited to, assertions that PFCs lose their trust fund status unless traceable within the co-mingled funds; that they become part of the air carrier's secured creditors' cash collateral; or, that they cannot be remitted to the airport authority because there are insufficient funds remaining in the air carrier's accounts to make the payments (a particularly troubling issue where air carrier daily "cash burn" is being report to be as much as \$20 million per day).

The provision that PFCs need not be segregated by air carriers was instituted as an accommodation to the air carriers who claimed that it would be too costly, burdensome, difficult,

or not feasible. However, this accommodation was not meant to destroy the trust fund nature at the core of the statute nor impair the interests of the airport authorities in their trust fund assets.

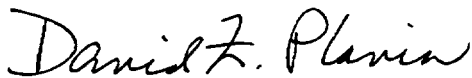
Air carriers should not be permitted to defeat the predicate intent of a statute by exploiting a practical accommodation. Stronger provisions and mechanisms are required to insure and protect Congress' intent that PFCs are, and are treated as, inviolable trust funds. Airport authorities are the statutory beneficiaries of PFCs from the moment of collection and are entitled to receive timely payment and full realization of value of PFCs.

For all the reasons described above, ACI-NA/AAAE strongly encourage the elimination of section 158.49 of Title 14 of the Code of Federal Regulations i.e., the provision that permits commingling of PFC revenues with other airline funds. Collected and remittable PFCs should be segregated from the air carrier's cash and other assets and placed in one or more interest-bearing escrow accounts for the benefit of the airport authorities. It would not be necessary for airlines to establish separate account for each airport, provided that the airline complies with Part 158 and with the airline audit guidelines in accordance with 14 Code of Federal Regulations (CFR) Part 158, "Passenger Facility Charges" requirements. In the alternative, air carriers should be required to provide to the airport authority a letter of creditor, bond or other form of adequate security in an amount equal to estimated remittable PFCs for a specified period of time, to be assessed against later audit, upon which security the airport authority must be entitled to draw automatically without the necessity of taking any further legal or judicial action to effectuate foreclosure.

Moreover, it should be made expressly clear that, where PFCs are co-mingled with cash or other assets in which an air carrier or its creditors have an interest, there is no requirement that

such PFCs be traceable in order to affirm their trust fund status. It should be made expressly clear that any inability to trace such funds shall not defeat the trust fund status of the PFCs,

Finally, it is critical that air carriers who file for bankruptcy protection be required to act in full compliance with both the letter and the intent of the law, regardless of whether the bankruptcy proceeding takes place under Chapter 11 or Chapter 7. To the extent an air carrier fails to comply with Part 158 requirements, a mechanism should be established to compensate the airport authority for the costs it is forced to incur to litigate to recover or retain payment of PFCs. Such restitution, for example, could come from a reduction of the proposed air carrier offsets at issue in the Proposed Rule.



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